

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Christopher Legere

v.

Case No. 10-cv-13-PB
Opinion No. 2015 DNH 046

Edward Reilly, Warden,
Northern New Hampshire
Correctional Facility

MEMORANDUM AND ORDER

Before the court is respondent's motion for summary judgment (doc. no. 37), and supplemental brief related to that motion (doc. no. 41), seeking judgment as a matter of law on all claims asserted in Christopher Legere's amended petition for a writ of habeas corpus (doc. no. 27), filed pursuant to 28 U.S.C. § 2254. Legere objects. See Obj. (doc. no. 43). For the reasons stated below, the motion for summary judgment (doc. no. 37) is granted, Legere's amended § 2254 petition (doc. no. 27) is denied, and the court declines to issue a certificate of appealability.

I. Background¹

A. Facts Underlying Legere's Conviction

1. The Shooting

In the late evening of June 24, 2006, and the early morning hours of June 25, 2006, Christopher Legere was at Three Cousins, a restaurant and bar in Manchester, New Hampshire. Legere's girlfriend, Amy Caswell, was working that night as a bartender at Three Cousins, and Legere generally spent the evening there when she was working. On June 24, 2006, Legere was at the bar socializing and singing karaoke when something drew his attention to the street outside of the bar.

At some point, John Denoncourt rode up on his motorcycle and was talking to Tracy Beardsdell and William Hill outside Three Cousins. Beardsdell and Hill were arguing because Hill wanted to ride Denoncourt's motorcycle, and Beardsdell felt that Hill was too intoxicated. Although Denoncourt was not a member of the Hells Angels Motorcycle Club, he was wearing a "Hells Angels support shirt" that evening. Beardsdell and Hill told

¹The facts and procedural history upon which the court relies have been gleaned from the record before and decisions of the state courts involved in Legere's trial, post-conviction litigation, and appeals. See [Cullen v. Pinholster](#), 131 S. Ct. 1388, 1398 (2011) ("[R]eview under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits.").

Denoncourt that he could not go into Three Cousins wearing a Hells Angels shirt because Three Cousins had a policy against its patrons wearing any apparel showing membership in or support for any motorcycle club. Denoncourt indicated that he didn't care. Legere, who was a member of the Outlaws Motorcycle Club, was wearing a black Outlaws shirt, but had covered the word "Outlaws" with tape.

Legere went outside when he, and other Three Cousins patrons, became aware of the commotion. A fight or struggle ensued, involving a number of people, including Legere. During that altercation, a number of people saw Legere being held back, or struggling with, several people. In the end, Legere shot Denoncourt in the chest. Denoncourt tried to leave, but, approximately 340 feet from the altercation, fell and died from the gunshot wound. Legere left the scene in a white sports utility vehicle, and returned shortly thereafter on his motorcycle, wearing a different shirt. Legere helped Caswell at Three Cousins for a while, and then left. He was later charged with Denoncourt's murder.

A number of people present inside and outside Three Cousins on the night of the shooting testified at Legere's trial. Daniel Nadeau, a Three Cousins patron, testified that he saw

Legere holding a small black gun, and shooting it as he jumped over people. Nadeau stated that he saw Legere point and shoot the gun at an individual running away from the scene. Nadeau also testified that during the shooting, several people were trying to hold Legere back and that one person screamed, "Stop, Buster, Stop." Other witnesses at trial testified that: Legere's nickname is "Buster"; Legere is a member of the Outlaws; the shooter was wearing a black shirt; Legere was wearing a black shirt at the time of the shooting; prior to the shooting, Legere had a hard metal object in his waistband, under his shirt; and after the shooting, someone yelled something to the effect that "Buster shot a Hells Angel" and that everyone should leave because the Hells Angels and/or the police were going to be arriving.

2. Expert Testimony

The state called Maryland State Police Lt. Terry Katz as an expert witness to testify about the history of the violent rivalry between the Hells Angels and Outlaws motorcycle clubs, particularly over territorial issues. Lt. Katz testified that the Outlaws and Hells Angels have an antagonistic relationship extending back decades, that has resulted in violence, including gang fights, serious assaults, and homicides. He further

testified that intrusion on the territory of one of those clubs by the other would result in a confrontation that could ultimately turn violent. Lt. Katz explained that both the Hells Angels and the Outlaws consider themselves to be "One Percenters," which Katz explained means that "they exist only by their own rules, not society's." Katz also told the jury that two of the Outlaws' mottos are "God forgives, Outlaws don't" and "Snitches are a dying breed."

B. Procedural History

1. State Court

In 2007, a jury convicted Legere of second degree murder, and Legere was sentenced to serve 45-90 years in prison. See State v. Legere, No. 06-S-1741, 1742 (N.H. Super. Ct., Hillsborough County N. ("HCSC") May 10, 2007). The New Hampshire Supreme Court ("NHSC") affirmed Legere's conviction. See [State v. Legere](#), 958 A.2d 969, 972 (N.H. 2008).

In 2010, Legere, through court-appointed post-conviction counsel, filed a motion for a new trial ("MNT") in the HCSC, asserting that Legere's trial attorney had failed to provide him with effective assistance of counsel. The HCSC held an evidentiary hearing on Legere's motion, and Legere moved to amend the MNT. The HCSC denied both the MNT and the motion to

amend. See State v. Legere, No. 06-S-1741, 1742 (HCSC Aug. 26, 2011) ("MNT Order")). The NHSC accepted Legere's discretionary appeal of HCSC's order. See State v. Legere, No. 2011-0687 (N.H. Feb. 3, 2012).

While the MNT appeal was pending, Legere filed a state habeas petition in the Merrimack County Superior Court ("MCSC"), which that court denied. See Legere v. Gerry, No. 217-2011-CV-537 (N.H. Super. Ct., Merrimack County Nov. 9, 2011). The NHSC accepted Legere's appeal of the MCSC order, consolidated it with the MNT appeal, appointed appellate counsel for Legere, and denied Legere leave to file a supplemental pro se brief. See Legere v. Warden, No. 2012-0074 (N.H. Apr. 2, 2012). On August 21, 2013, the NHSC affirmed both HCSC's ruling on the MNT and the MCSC order denying the state habeas petition. See State v. Legere, No. 2011-0687 (N.H. Aug. 21, 2013) ("August 21 NHSC Opinion").

2. Federal Habeas Petition

Legere filed a petition for a writ of habeas corpus in this court before the above-described state proceedings had ended. This court stayed the petition to allow Legere to exhaust his state remedies as to the claims in his petition. See Order (doc. no. 6). The court lifted the stay in November 2013 and

directed service of Legere's Amended Petition (doc. no. 27), which is the operative pleading in this matter. See Order (doc. no. 32). Respondent has filed a motion for summary judgment (doc. no. 37) and a supplemental brief in support of that motion (doc. no. 41). Legere objects (doc. no. 43).

Legere raises the following claims for relief:

1. At Legere's trial, the prosecutor engaged in misconduct during his closing argument, which so infected the fundamental fairness of the proceedings as to violate Legere's Fourteenth Amendment due process rights, as follows:

a. In his closing argument, the prosecutor improperly relied on facts that were not supported by the evidence at trial.

b. In his closing argument, the prosecutor improperly asserted his personal opinion as to: (i) the credibility of certain witnesses, (ii) Legere's guilt, and (iii) the truth or falsity of certain evidence.

2. The trial court improperly admitted in evidence expert testimony from Maryland State Police Lt. Terry Katz, concerning the Hell's Angels and Outlaws motorcycle clubs, in violation of Legere's Fourteenth Amendment due process right to a fair trial.

3. Legere was denied his Sixth Amendment right to the effective assistance of counsel when his trial counsel:

a. failed to object to the prosecutor's opening statement and closing arguments, to the extent the prosecutor: (i) relied on facts not supported by the trial evidence, and (ii) expressed his personal opinion as to witness credibility, Legere's guilt, and the truth or falsity of certain evidence;

b. failed to object to the admission of expert testimony concerning the Hell's Angels and Outlaws motorcycle clubs when that testimony exceeded the scope of the expert opinion that had been permitted by the trial court after a pretrial hearing; and

c. failed to request a limiting instruction concerning the appropriate use of the expert testimony concerning the Hell's Angels and Outlaws.

See Amended Petition (doc. no. [27](#)).

II. Discussion

A. Standard for Reviewing State Court Decisions

1. Rulings on the Merits of Federal Claims

A federal court may grant habeas corpus relief "only on the ground that [a petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." [28 U.S.C. § 2254\(a\)](#); see also [Cullen v. Pinholster](#), [131 S. Ct. 1388](#), [1398](#) (2011). When a prisoner brings a claim in federal court that was adjudicated on the merits in State court proceedings,

[f]ederal habeas relief may not be granted . . . unless it is shown that the earlier state court's decision was contrary to federal law then clearly established in the holdings of th[e Supreme] Court; or that it involved an unreasonable application of such law; or that it was based on an unreasonable determination of the facts in light of the record before the state court.

Harrington v. Richter, 562 U.S. 86, 100 (2011) (internal quotation marks and citations omitted) (citing 28 U.S.C. § 2254(d)).

A state court's ruling is contrary to federal law either when it adopts a rule that contradicts the governing law set forth in the Supreme Court's cases or when it reaches a different result from a Supreme Court decision under a set of facts that are materially indistinguishable. Even if the state court correctly identifies the law, it may unreasonably apply the law to the facts of the case. To be unreasonable . . . the application of federal law must be more than incorrect or erroneous. In other words, some increment of incorrectness beyond error is required. Finally, we only overturn state court factual determinations that are unreasonable in light of the record.

Rosenthal v. O'Brien, 713 F.3d 676, 683 (1st Cir. 2013), cert. denied, 134 S. Ct. 434 (2013) (internal quotation marks and citations omitted). The petitioner bears the burden both of showing that the state court decision is contrary to established federal law, and of rebutting the presumption of correctness of state court factual findings by clear and convincing evidence. See 28 U.S.C. § 2254(e)(1); Cullen, 131 S. Ct. at 1398.

2. Procedurally Defaulted Federal Claims

Respondent argues that certain claims in Legere's petition must be deemed procedurally defaulted. "A state court's invocation of a procedural rule to deny a prisoner's claims

precludes federal review of the claims if, among other requisites, the state procedural rule is a nonfederal ground adequate to support the judgment and the rule is firmly established and consistently followed.” [Martinez v. Ryan](#), 132 S. Ct. 1309, 1316 (2012). A claim may be deemed procedurally defaulted “if it was not presented to the state courts and it is clear that those courts would have held the claim procedurally barred.” [Pike v. Guarino](#), 492 F.3d 61, 73 (1st Cir. 2007). Respondent “bears the burden . . . of persuading the court that the factual and legal prerequisites of a default . . . are present.” [Id.](#) (internal quotation marks and citation omitted).

A federal court cannot review a procedurally defaulted claim in a § 2254 petition, unless the petitioner demonstrates either “actual innocence,” or “cause” and “prejudice.” [Costa v. Hall](#), 673 F.3d 16, 25 (1st Cir. 2012) (citation omitted); see also [Lee v. Corsini](#), 777 F.3d. 46, 58, 62 (1st Cir. 2015). Cause “ordinarily turn[s] on whether the prisoner can show that some objective factor external to the defense impeded counsel’s efforts to comply with the State’s procedural rule.” [Costa](#), 673 F.3d at 26 (quoting [Murray v. Carrier](#), 477 U.S. 478, 488 (1986)). To prove prejudice, a petitioner must demonstrate that the violations of federal law “worked to his actual and

substantial disadvantage, infecting his entire trial with error of constitutional dimensions.’” Id. (quoting Carrier, 477 U.S. at 494) (emphasis in original).

Unexhausted claims of ineffective assistance of counsel cannot serve as cause for the procedural default of a different claim. See Lynch v. Ficco, 438 F.3d 35, 46 (1st Cir. 2006). A petitioner who cannot show prejudice to establish a claim under Strickland v. Washington, 466 U.S. 668 (1984), also cannot meet the “cause and prejudice” standard to excuse a procedural default. Lynch, 438 F.3d at 49-50.

Legere has raised ineffective assistance of counsel as cause for any procedural defaults of his claims that may have occurred in the state proceedings. Accordingly, I address Legere’s ineffective assistance of counsel claims (Claims 3(a)-(c)) before resolving any other claims that the respondent alleges are procedurally defaulted.

B. Ineffective Assistance of Counsel (Claim 3)

Legere asserts that trial counsel provided him with ineffective assistance by: failing to object to the prosecutor’s allegedly improper closing argument (Claims 3(a)(i) and (ii)), failing to object to improper expert testimony (Claim 3(b)), and failing to request that the judge give the jury a limiting

instruction concerning the appropriate use of expert testimony (Claim 3(c)). The HSCS rejected each of those claims on the merits. See MNT Order. Legere raised each issue in his notice of appeal of the MNT Order, but his court-appointed appellate counsel chose to brief only Claims 3(a)(ii) and 3(c). As to those claims -- challenging trial counsel's failure to object to the prosecution's inclusion of personal opinions during closing argument and failure to request a limiting instruction -- the NHSC ruled in favor of the State. See August 21 NHSC Opinion.

1. Legal Standard - Ineffective Assistance of Counsel

To prove a Sixth Amendment violation based on the failings of defense counsel, a petitioner must demonstrate both (1) that counsel's performance was deficient, meaning that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment; and (2) that the deficient performance prejudiced the defense.

Scoggins v. Hall, 765 F.3d 53, 56 (1st Cir. 2014) (internal quotation marks and citations omitted), cert. denied, 135 S. Ct. 1007 (2015). Counsel is entitled to a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. Counsel will only be found to have provided deficient assistance "where, given the facts known [to counsel] at the time, counsel's choice was so patently unreasonable that no competent

attorney would have made it.'" [Scoggins](#), 765 F.3d at 57 (quoting [Knight v. Spencer](#), 447 F.3d 6, 15 (1st Cir. 2006)). To establish prejudice, petitioner must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." [Strickland](#), 466 U.S. at 694.

2. Claim 3(a)(ii)

As to trial counsel's failure to object to the prosecutor's injection of his personal opinion into his closing argument, the last reasoned state court decision is the August 21 NHSC Opinion. The NHSC, applying a state standard equivalent to [Strickland](#), found that Legere could not demonstrate actual prejudice based on personal opinion statements the prosecutor may have made in closing argument, because "the evidence against [Legere] was overwhelming." MNT Order at 11. The NHSC's finding concerning the strength of the evidence of guilt is amply supported by the record and is reasonable. Further, the NHSC correctly applied the prejudice prong of the [Strickland](#) standard in its ruling. Legere has failed to demonstrate that the NHSC's finding was contrary to, or involved an unreasonable application of federal law, or that the NHSC unreasonably determined the facts in the record. Therefore, Legere is not

entitled to habeas relief on Claim 3(a)(ii), and the motion for summary judgment is granted on that claim.

3. Claim 3(c)

As to trial counsel's failure to request a limiting instruction concerning the expert evidence regarding motorcycle gangs, the last reasoned state court decision is also the August 21 NHSC Opinion. Legere here argues that, without a limiting instruction, the jury was free to consider the expert testimony as evidence that Legere had a propensity for violence and unlawfulness, or for other improper purposes. At the May 24, 2011, hearing in the HCSC on Legere's MNT, defense counsel testified that his decision not to request a limiting instruction was strategic, and he explained his rationale. See MNT Order at 6. The NHSC found that counsel's explanation "reflect[ed] a well-conceived balancing of the relative risks of having the court issue the instruction against its possible benefits," and rejected Legere's claim. See August 21 NHSC Opinion at 3. The facts relied on by the NHSC on the issue of counsel's decision concerning a limiting instruction are supported by the record and are reasonable. Further, the NHSC correctly applied the Strickland standard to the question of whether counsel's actions were reasonable, and thus not of the

kind that would support an ineffective assistance of counsel claim. Legere has failed to demonstrate that the NHSC's decision was contrary to, or involved an unreasonable application of, established federal law, or that the NHSC unreasonably determined the facts in the record. Accordingly, Legere is not entitled to habeas relief on Claim 3(c), and summary judgment on that claim is warranted.

4. Procedural Default of Claims 3(a)(i) and 3(b)

Legere claims that his trial counsel was ineffective for failing to object to the prosecutor's closing argument to the extent the prosecutor relied on facts that Legere claims were not supported by the trial evidence, and for failing to object to both the admission and extent of the expert testimony. The HCSC ruled against Legere on both issues in the MNT Order, but Legere's court-appointed appellate counsel chose not to brief those issues, and the NHSC denied Legere's motion to file a supplemental brief addressing the issues.

Citing state court cases indicating that New Hampshire courts consistently apply the rule that issues not briefed are waived, see, e.g., [State v. Blackmer](#), 816 A.2d 1014, 1016 (N.H. 2003), respondent argues here that Legere's failure to brief these two claims in the NHSC appeal should be treated as a

procedural default. See [Pike](#), 492 F.3d at 73. Respondent has carried his burden to demonstrate that the claims at issue have been procedurally defaulted.

Legere points to appellate counsel's failure to brief those issues, coupled with the NHSC's decision precluding him from filing a supplemental pro se brief, as cause and prejudice for the default. I examine this argument by first considering whether Legere was prejudiced by his inability to brief his claims in the NHSC.

In this instance, the HCSC provided the last reasoned state court opinion on this claim, and that court determined that the prosecutor's summation, to the extent it relied on facts Legere claims were not supported by the trial evidence, was, in fact, fair argument. For reasons stated below with respect to Claim 1(a), this court must defer to that finding. Therefore, Legere has not carried his burden of showing prejudice with respect to the failure to brief Claim 3(a)(i) in the NHSC.

As to Claim 3(b), Legere has failed to show prejudice because the NHSC determined in Legere's direct appeal that the expert testimony was admissible. Legere has not shown any reasonable probability of a different result if Claim 3(b) had been briefed in the appeal of the MNT Order. Legere has thus

failed to show prejudice with respect to those procedurally defaulted claims. This court is thus precluded court from granting relief on them, and summary judgment is properly granted on Claims 3(a)(i) and 3(b).

C. Prosecutor's Use of Facts Not in Evidence (Claim 1(a))

Respondent moves for summary judgment on Claim 1(a), regarding the prosecutor's reliance on facts not in evidence in his closing argument, on the ground that the claim is procedurally defaulted, thereby precluding federal habeas relief. The HCSC cited trial counsel's failure to object to the prosecutor's closing argument as to this issue, as an independent ground for that court's order rejecting Claim 1(a) in the new trial proceedings. See MNT Order at 7-8. The NHSC did not disturb that ruling on appeal, or otherwise rule on the merits of Claim 1(a). The cases cited by the HCSC and respondent, see, e.g., Broughton v. Proulx, 880 A.2d 388, 391-92 (N.H. 2005); State v. Ayer, 834 A.2d 277, 286 (N.H. 2003), show that the waiver rule at issue was an independent and adequate state ground for that court's order rejecting Claim 1(a). See MNT Order at 7, 15. Accordingly, respondent has shown that Claim 1(a) was procedurally defaulted in the state courts.

Legere has argued that ineffective assistance of trial counsel, in failing to object to the challenged argument, was cause for the default, and resulted in prejudice. In the MNT Order, however, the HCSC found that the challenged portions of the prosecutor's argument were fair statements based on the evidence at trial and were thus proper. See MNT Order at 15. The HCSC's findings and conclusions of law on that issue are entitled to deference, as they represent the last reasoned state court decision on that issue, and are reasonable and supported by the record in this case. See [Rosenthal](#), 713 F.3d at 683. Moreover, that court, applying a Strickland standard, specifically rejected Legere's ineffective assistance of counsel claim arising out of the failure to object to that portion of the prosecutor's argument. I defer to that application of Strickland to the state court record.

Accordingly, Legere has not shown cause and prejudice arising out of his trial counsel's failure to object to the prosecutor's reliance on facts not in evidence in closing argument. Nothing in the record suggests any other basis upon which to excuse the procedural default of this claim. Petitioner, therefore, is not entitled to relief on Claim 1(a), and summary judgment is warranted on Claim 1(a).

D. Prosecutor's Personal Opinions (Claim 1(b))

Legere asserts that during closing argument, the prosecutor expressed his personal opinion of: the credibility of certain witnesses, Legere's guilt, and of the truth or falsity of certain evidence at trial. None of these allegedly improper comments were objected to at trial, and were thus not preserved for direct appeal. The claims are thus procedurally defaulted, as discussed above. See Pike, 492 F.3d at 73 (claim may be deemed procedurally defaulted "if it was not presented to the state courts and it is clear that those courts would have held the claim procedurally barred").

Again, Legere asserts that the cause of the procedural default was his attorney's erroneous failure to object to the improper argument at trial. For reasons set forth above with respect to Claim 3(a)(ii), Legere has not shown that his counsel's performance was constitutionally deficient. Cf. Lynch, 438 F.3d at 49-50 (petitioner who cannot show prejudice to establish claim under Strickland also cannot meet the "cause and prejudice" standard to excuse procedural default). Legere cannot rely on trial counsel's failure to object to the prosecutor's alleged expression of personal opinions in his closing argument to demonstrate cause and prejudice for the

procedural default of Claim 1(b). Accordingly, petitioner is not entitled to relief on that claim, and summary judgment is proper on Claim 1(b).

E. Expert Testimony (Claim 2)

Legere challenges the admission at his trial of expert testimony from Lt. Katz, concerning the Outlaws and Hells Angels. Legere alleges that the admission of this testimony violated his due process right to a fundamentally fair trial under the Fourteenth Amendment.

Legere did not explicitly raise federal due process claims concerning the admission of the testimony challenged in Claim 2, either in the trial court, or on direct appeal. On direct appeal, Legere challenged the admission of the expert testimony under state law, alleging that the prejudicial effect of the testimony outweighed its probative value. In its decision affirming Legere's conviction, the NHSC found that, under state law, the testimony was properly admitted. See [Legere](#), 958 A.2d at 983-84.

As explained above in regard to Claim 1(b), Legere's federal due process claim concerning the Katz testimony is procedurally defaulted, as it was not raised on direct appeal. Further, Legere cannot demonstrate prejudice excusing the

procedural default, as the last state court to rule on whether the evidence itself was prejudicial, the NHSC on direct appeal, ruled that all of the expert testimony was properly admitted. See id. In doing so, the NHSC found, as to the trial court's admission of the evidence, that "[w]hile this evidence was prejudicial, we do not agree that the danger of unfair prejudice substantially outweighed its probative value." Id. at 982. The MNT Court, following the NHSC's opinion, found that Legere's trial counsel was not ineffective for failing to object to the admissible testimony, as the evidence was admissible and the objection would have been overruled. See MNT Order at 6-7. That finding is neither unreasonable, nor contrary to federal law.

Accordingly, Legere has failed to demonstrate "prejudice" to excuse the procedural default of Claim 2. Legere, therefore, is not entitled to relief on Claim 2, and the motion for summary judgment is properly granted on that claim.

F. Certificate of Appealability

The Rules Governing Section 2254 Proceedings ("§ 2254 Rules") require the court to "issue or deny a certificate of appealability when it enters a final order adverse to the party." § 2254 Rule 11(a). The court will issue the

certificate "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Legere has failed to make such a showing. Accordingly, the district judge should decline to issue a certificate of appealability in this case.

III. Conclusion

For the foregoing reasons, the court orders:

1. Respondent's motion for summary judgment (doc. no. 37) is GRANTED.

2. The petition (doc. no. 27) is DENIED.

3. The court declines to issue a certificate of appealability.

SO ORDERED.

/s/ Paul J. Barbadoro
Paul J. Barbadoro
United States District Judge

March 10, 2015

cc: Christopher L. Legere
Elizabeth C. Woodcock, Esq.